the provision contained in section 18 of the Wills Act is a matrimonial and not a testamentary provision seems open to question and in any case it does not appear to controvert the general principle that a will of immoveable property must be valid according to the *lex status*.

I have therefore come to the conclusion that the will under consideration is inoperative so far as the realty is concerned. I do so rather reluctantly because I feel that the provision in our law is somewhat unsuitable in the case of foreigners domiciled abroad, especially to such as practise polygamy and who are probably ignorant of the peculiar provision of our law. This matter must however be put right, if it is thought proper to do so, by the Legislature and not by the Courts.

In my view the original probate should therefore have been restricted to the moveable property of the testator. Whether I can on the present application so vary the probate instead of revoking it seems doubtful in consequence of the terms of section 886 of the Civil Procedure Code. The point however is an academic one as I understand that so far as the moveables are concerned the administration has for many years been concluded.

I therefore direct that the probate of the 25th October, 1915 be revoked.

The costs of all parties as between solicitor and client should come out of the estate.

Order accordingly.

Solicitors for Applicant : *Sisson & Delay.*

Solicitors for Respondents: *Drew & Napier.*

[ORIGINAL CIVIL JURISDICTION.]

WHITLEY, J.

April 18, 1935.

RE THE FIRM OF T. S. N.

[PENANG BANKRUPTCY No. 109 of 1929.]

Bankers' Lien—Customer with accounts at two branches—Bank entitled to charge account at first branch with debt at second branch.

A Bank's customers had an account with the Bank at its branch in Penang. They were also liable to the Bank in respect of indebtedness to the Bank's branches at Medan and Rangoon. Valuable securities were from time to time deposited by the customers with the Bank's Penang branch. These securities were deposited without any documents of hypothecation to secure overdrafts or liabilities of the customers with the Bank's branches in Penang and Medan. The customers became bankrupt. Parts of the securities were realised and the overdraft at the Penang Branch was paid off and part of the Medan liabilities were discharged.

The Official Assignee now claimed to redeem the remaining securities on payment of the amount of the remaining liabilities to the Medan branch. The Bank claimed to hold the remaining securities until all indebtedness of the customers had been discharged, including a large sum admittedly due by the customers to the Rangoon branch of the Bank.

Held, that the Bank had a general lien upon the securities deposited with the Bank's Penang branch and that such general lien extended to cover any indebtedness of the customers at the Rangoon branch of the Bank.

Palgrave Simpson for the Chartered Bank of India, Australia and China.

Hume for the Official Assignee, Penang.

The facts and arguments are sufficiently set out in the Judgment.

Cur. Ad. Vult.

WHITLEY, J.—This was a motion taken out by the Chartered Bank of India Australia and China under section 89 of Ordinance No. 44 (Bankruptcy) for the decision of a question which had arisen as to whether the Bank has a general lien upon certain securities deposited with it by the debtor firm.

There is no dispute as to the facts. On the 14th August, 1929 the date upon which the Receiving Order was made against the firm the Bank had in its possession at its Penang branch a large number of title deeds in respect of immoveable property which had been deposited from time to time by the firm without any documents of hypothecation. These title deeds had been deposited to guarantee overdrafts of the Firm of T. S. at the Bank's Medan branch and to secure an overdraft in Penang which was not to exceed $350,000. The value of the securities deposited appears in the Bank's records as $727,000.

A Scheme of Arrangement was sanctioned by Order of Court dated the 3rd January, 1930 and the land comprised in many of the title deeds has been sold by the Bank with the concurrence of the Official Assignee's Special Manager with the result that the Penang overdraft and part of the moneys due in Medan has been paid off. Title deeds to the nominal value of $246,000 still remain in the possession of the Bank in Penang and The Official Assignee claims that, inasmuch as these securities were deposited with the Bank by way of equitable mortgage for the purpose of securing the amount due to the Bank in respect of the Penang overdraft and the Medan guarantees, he is entitled to redeem them on repayment of any sum still remaining due under the guarantees.

The Bank contends that it has a general lien upon these securities and that it is entitled to retain them until all indebtedness due to it by the firm has been discharged including a large sum admittedly due to its Rangoon branch for the balance due on the firm's cash credit account there.

The general lien of bankers on the securities of customers in their hands is part of the law merchant and is a general usage of which Courts

of Justice have to take judicial notice and, as Lord Campbell observed in his judgment in the leading case of *Brandao* v. *Barnett*, 69 R.R., at page 215—"bankers most undoubtedly have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract, or circumstances which show an implied contract, inconsistent with lien." That being so it is for the Official Assignee in the present case to show either that there is an express contract or circumstances inconsistent with this general lien or that the title deeds deposited are not securities which can be the subject of such a general lien.

Mr. Hume for the Official Assignee relied firstly upon the case of *Vanderzee* v. *Wills*, 29 E.R. 385, in which it was held that bankers having securities deposited as a pledge for £1,000 had no lien further than the £1,000 although the depositor at his death was indebted in a larger sum than the £1,000. The argument which prevailed in that case was that it was impossible that the bankers could at the time they took the security have considered that it was for more than the £1,000 inasmuch as the depositor was already at that time indebted to them to the extent of a further £400. That is not the position in the present case, for there is no evidence that at the time these title deeds were deposited the firm were further indebted to the Bank. That was an old case decided in 1789. In the more recent case of *Wylde* v. *Radford*, (1864) 33 L.J. Ch. 51, there was a deposit of a title deed relating to two properties accompanied by a written memorandum to the effect that the deposit was for the specific purpose of giving a security upon one only of the properties comprised in the one deed and it was held that as the deposit was for the purpose of giving a security upon one property only the bankers could claim no general lien by custom of bankers upon the other property. It was only the accident that the two properties happened to be included in one title deed which led to the title deed relating to the second property being deposited at all and if there had been a separate deed for such property that relating to the second would not have been deposited. That case was followed in *In re Bowes*, L.R. 33 Ch. D. 586 where an insurance policy was deposited with a memorandum of charge to secure overdrafts "not exceeding £4,000." And it was held that the express terms of the deposit were that sums not exceeding £4,000 were to be paid out of the policy moneys and that it would be inconsistent with those express terms in the absence of any additional agreement to allow the bank to hold the policy for something more. The general lien which there would have been unless excluded was excluded by the contract in which the words "not exceeding" were used. In the present case there is no such express contract and the position is more analogous to that which obtained in the case of *Jones* v. *Peppercorne*, 123 Revised Reports 177. There, bonds were deposited with a broker as security for a specific loan. As the Vice-Chancellor (Sir W. Pagewood) observed in his judgment at page 184, when the bonds were deposited no one could foresee what might be the exact amount required to satisfy this specific loan. The bonds were perpetually fluctuating in price and the whole of them being deposited, no one knowing, by reason of the fluctuating value of the property, the exact number which would be required for the purpose of answering the specific purpose, there was nothing to prevent the general lien from attaching. It seems to me that, if one substitutes the words title deeds for 'bonds,' that is precisely the position as between the firm and the bank here. The Vice Chancellor went on to say that this general lien of brokers like that of bankers is a doctrine of which the Court would take judicial cognizance treating it as an established fact not requiring to be made out by evidence.

Holding as I do that there was no express contract such as would exclude the general lien the next point to be considered is whether there were any circumstances showing an implied contract to exclude it. I can find none. The principles which the Court should apply in deciding whether a term should be implied in a contract are clearly stated in two judgments of Scrutton, L.J. In *Fowler* v. *Commercial Timber Company*, L.R. 1930, 2 K.B. 5 he observed that, broadly speaking, the Court only implies a term in a contract if it is such an obvious term that if the parties had thought of it they must have agreed to it and in *Reigate* v. *Union Manufacturing Company*, L.R. 1918, 1 K.B. at page 605 he stated the law as follows:—

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.'

Applying these principles I do not think that it can be said that it is obvious that if the question had been raised at the time of the deposit of the title deeds the Bank would have

agreed that their general lien should be excluded.

I hold accordingly that there is no contract express or implied such as to exclude the general lien provided that title deeds can properly be the subject of that lien.

Mr. Hume contended strongly that they could not and the authorities are undoubtedly to some extent conflicting on this point. In *Wylde* v. *Radford*, 33 L.J. Ch. 51, Kindersley Vice-Chancellor appeared to doubt whether title deeds could be the subject of a banker's general lien but the decision in that case did not turn upon the opinion thus expressed. That case was decided in 1863, and, in the later case of *In re Trethowan*, L.R. 5 Ch. 559, Bacon, C.J. at page 565 observed that a deposit of title deeds undoubtedly gave to the bankers a general lien and that they had this general lien "upon deeds like any other security." Mr. Hume suggested that the term "general lien" was there used loosely, and that what was really meant was a mortgage, but I can see no good reason so to restrict the words of the learned Chief Justice especially in view of the very wide language used by Lord Hatherley in *Nisa* v. *Currie*, 1 A.C. 567 in which he referred to "the lien which bankers have upon all documents which are placed in their hands by customers who are indebted to them in the course of their banking transactions." Commenting upon that case in "The Law of Banking" 4th Edition page 845, Mr. Hart observes that it seems doubtful if there is any sound reason for restricting the generality of the words. I adopt the view of that learned author and hold that title deeds can be the subject of a banker's general lien.

Mr. Hume's next contention was that the Bank cannot claim at the same time to hold an equitable mortgage and also have a general lien but *Jones* v. *Peppercorne (supra)* and the cases following it seem to establish that they can.

The only other point remaining to be considered is whether the general lien which the Bank have upon securities deposited by a customer at one of its branches extends to cover also the general indebtedness of the same customer at one of the Bank's other branches. The cases seem definitely to establish that it does so extend. In *Re European Bank*, L.R. 8 Ch. Appeals Sir W. M. James, L.J. observed that as between banker and customer whatever number of accounts are kept in the books the whole is really but one account and it is not open to the customer, in the absence of some special contract, to say that the securities he deposits are only applicable to one account. In that case the customer had two separate accounts at the same branch. In the case of of *Garnett* v. *M'Kewan*, L.R. 8 Ex. 10 the Plaintiff kept separate accounts at two different branches of the Defendant's Bank and his credit balance at one branch approximately equalled his debit at the other. It was held that in the absence of any special contract between the parties that each account should be kept separate, the Bank was entitled at any time to combine the accounts and to charge the account at the first branch with the debt at the second branch. Although in that case no question of lien arose some of the passages in the judgment of Bramwell, B. seem so apposite to the principles which should apply in the present case that I propose to quote them 'in extenso.'

> "The Bank would not have any right to blend two accounts kept by one person with them in different character, as a personal and a trust account. But here there was nothing except the fact that there were two branch establishments. Nothing was said as to their being separate and nothing should be implied.. .... If a customer could draw anywhere where he had a balance, no matter what the real debit against him might be, there would be a real hardship upon bankers but to limit his drawing to the amount of his total actual balance is no hardship on him for he always knows or can know if he likes, the state of his account as a whole. In practice bankers do constantly allow overdrawing at a particular branch because they know they may debit the customer with his balance at some other branch..... I think therefore that the customer has no claim for he is indebted to the bank on his whole account in such an amount as to reduce his assets almost to nothing. There is no duty in my opinion, apart from usage or contract, on the part of the banker to honour cheques at one branch because the customer has a credit there, if at another branch there is a countervailing debit."

I hold accordingly that the general lien upon these title deeds deposited in Penang extends to cover any indebtedness of the firm at the Rangoon branch of the Bank and that the Bank are entitled to succeed on the issue raised by this Motion.

Solicitors for the Chartered Bank of India, Australia and China—*Presgrave & Matthews*.
Solicitors for the Official Assignee—*Adams & Allan*.